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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955.

## No. 811

FAY M. WHITSELL,

*Petitioner,*

*vs.*

ERNEST B. ALEXANDER, A. M. SKEFFINGTON, MALCOLM E. EDWARDS, JOHN J. BRADY, MARGUERITE EBERL, GLENN H. MOORE, BAUSCH & LOMB OPTICAL COMPANY and AMERICAN OPTICAL COMPANY,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

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The Scheffer Press, Inc.—ANdover 3-6850

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on January 27, 1956.

### CITATIONS TO OPINIONS BELOW.

The opinion of the majority of the Circuit Court of Appeals and the dissenting opinion, printed in the Appendix hereto, *infra*, page 1a, are reported in 229 Fed. 2d 47.

## JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 27, 1956 (R. 72), Appendix hereto, page 1a, *infra*. Rehearing was denied on February 21, 1956 (R. 73). The jurisdiction of this Court is invoked under U.S.C. Sec. 1254(1).

## QUESTION PRESENTED.

Whether in an action seeking damages arising out of violations of the Anti-Trust laws in which a timely jury demand was made, the District Court can try without a jury the separate issue of limitations raised in the answers as affirmative defenses, the plaintiff having alleged various overt acts within the period of limitations.

## CONSTITUTIONAL PROVISION AND RULES OF THIS COURT INVOLVED.

This case involves the right of trial by jury as guaranteed by the Seventh Amendment to the Constitution, the preservation of which is provided for by Rules 38 and 39 of the Rules of Civil Procedure for the United States District Courts.

## STATEMENT.

In his action for damages resulting from a conspiracy to violate the Anti-Trust laws, the plaintiff alleged that pursuant to the conspiracy various overt acts were committed by certain defendants during and at specified dates within the period of two years before the commencement of the action. Specific allegations were that from the latter part of April, 1950

> "to date of filing of this complaint on April 28, 1952, said defendants conspired to keep, and did keep all members of the family of William B. Needles, including the plaintiff, from having any connection or relation with said College (the said Richard A. Needles

finally being ousted by said defendants on or about November 5, 1951), and during said period said defendants conspired to prevent and did prevent further referrals to plaintiff from being made from the clinic or faculty of said college, or any one connected with it (R. 21) * * * Said actions were a part of and in furtherance of the conspiracy herein set forth which has continued to the date of filing of this complaint to the continuing injury and damage of plaintiff since May 1, 1950 * * * As a practicing ophthalmologist and surgeon plaintiff enjoyed until subsequent to May 1, 1950, a large practice from patients referred to him from the clinic operated by and for said school as hereinabove set forth, of which he has been deprived by the acts and doings of the defendants above described.

27. As a practicing ophthalmologist and surgeon plaintiff enjoyed, until subsequent to May 1, 1950, by reason of the relation with said college hereinabove set forth, great prestige among certain optometrists who regularly referred patients to him, and with other colleges of optometry. In July, 1950, in furtherance of the conspiracy aforesaid * * * the defendants Moore, Edwards and Brady caused to be published of and concerning the plaintiff a false, malicious statement dated July 24, 1950, that plaintiff wasted, misappropriated and misapplied the funds of said college.

The unlawful conspiracy of the defendants to restrain trade and to create a monopoly above described, and the aforesaid overt acts in furtherance thereof, which acts (except those alleged to have occurred on specific dates) were continuous up to the date of filing this complaint, to-wit, on April 28, 1952, directly and proximately caused plaintiff to be deprived of all benefits of his previous relations with said college, caused a stoppage of referrals of patients to plaintiff, injured plaintiff's prestige and cost plaintiff the loss of a lucrative connection with another college, to plaintiff's damage * * *." (R. 22)

The defendants filed answers, pleading the Illinois two year statute of limitations, and joining issues of fact as to whether any of the overt acts occurred during the two year period, or whether all such acts occurred more than two years before commencement of the action. (R. 30, 42, 50, 56).

Notwithstanding that the plaintiff had duly demanded a jury trial (R. 50, 51) the District Court called the case for trial in the absence of a jury on the separate issue of the statute of limitations and heard evidence consisting of oral testimony of various witnesses and exhibits. The Court thereafter entered a "memorandum and order" stating that there was no genuine issue as to a material fact, and stating the Court's conclusion from the evidence that one overt act occurred, that it occurred on April 12, 1950, whereas the action was not commenced until April 28, 1952, and dismissing the action (R. 58).

The plaintiff appealed, contending that having made a timely demand for a jury trial he was entitled under the Seventh Amendment to the Constitution and Rules 38 and 39 of the Rules of Civil Procedure to a jury trial of all the issues presented by the pleadings and that it was error for the Court in the absence of a jury to hear witnesses, receive exhibits, draw inferences and conclusions, determine facts and dismiss the action.

The majority of the Court of Appeals took the position that it could not determine whether a fact issue existed without reviewing the evidence which is not in the record, *i.e.*, that the trial court's right to try the issue of fact depended upon what evidence was adduced at the trial; that "in the absence of evidence" the plaintiff was not entitled to a jury trial, and that the Court of Appeals could not determine plaintiff's right to a jury trial without reviewing the evidence (R. 70).

Judge Major, dissenting, said, of the majority opinion:

> "No decision is made as to whether plaintiff was entitled to a trial by jury upon all issues of fact raised by the pleadings, including those relevant to the plea of the statute of limitations. It is not claimed that disputed issues of fact relevant to such plea were not raised by the pleadings, and it should be kept in mind that issues of fact are made by pleadings and not by testimony, whether it be oral or documentary.
>
> If plaintiff was entitled to a jury trial as a result of his demand for such upon the factual issues made by the pleadings as they pertained to the statute of limitations, then it is immaterial what the District Court heard or decided. In other words, it is immaterial whether his decision that no material issue of fact was involved, made upon the testimony which he heard, was correct or erroneous. The point is that the court had no right to hear and decide, providing, of course, that plaintiff was entitled to a jury trial. The fact that the record of the proceedings before the Court is not here is of no consequence." (R. 71)

## REASONS FOR GRANTING THE WRIT.

1. In affirming the action of the trial court in depriving the plaintiff of a jury trial duly demanded, on material issues of fact admittedly made by the pleadings in a civil action seeking only damages, the Court of Appeals has decided an important question of federal law in a way in conflict with *Fleitman* v. *Welsbach*, 240 U.S. 27, and *Adamos* v. *New York Life Insurance Co.*, 293 U.S. 386.

2. In failing to recognize that the burden was upon the defendants to show affirmatively from the record that depriving the plaintiff of the right to a jury trial of substantial, material and controlling issues of fact admittedly made by the pleadings, was not prejudicial error, the judgment is in conflict with *Indiana Farmers Guide Pub-*

*lishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268, 281 and *McCandless* v. *United States*, 298 U.S. 342, 347, 348.

3. The judgment is in conflict with *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, in which the Court of Appeals had affirmed a judgment of dismissal on the ground that there was no genuine issue of fact and this Court reversing, said:

> "We think the defendant failed to show that it is entitled to judgment as a matter of law."

4. The decision of the Court of Appeals is in conflict with the decisions of the Courts of Appeals for the Second Circuit in *Ring* v. *Spina*, 166 Fed. 2d 546, certiorari denied 335 U.S. 813; for the Third Circuit in *Ettelson* v. *Metropolitan Life Insurance Co.*, 137 Fed. 2d 62, certiorari denied 320 U.S. 777; for the Fifth Circuit in *Nickelson* v. *Nestles Milk Products Corp.*, 107 Fed. 2d 17; and for the Eighth Circuit in *Leimer* v. *Wood*, 196 Fed. 2d 828.

5. The Court of Appeals has departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the lower court: Ascertaining the existence of an issue of fact is not a process of fact finding from evidence, but rather a determination whether there is any dispute as to a material fact from an examination of the contentions of the parties, the expression of which is limited to the formal pleadings, unless such issues are narrowed or eliminated by the summary judgment procedure. In the face of a proper jury demand, and allegations not of mere conclusions or vague generalities, but of well pleaded specific facts, the court could not properly enter a judgment of dismissal based upon its conclusions as to the veracity of witnesses or its weigh-

ing of evidence and the finding of facts therefrom which was the function of a jury.

6. By the action of the District Court and the judgment of the Court of Appeals the novel precedent has been established in the Seventh Circuit that a trial court may disregard a demand for a jury trial in any case, and require the party entitled to a trial by jury to go to trial before the court without a jury.

## CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. YOWELL,
*Counsel for Petitioner.*

# APPENDIX.

IN THE

## UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11550. OCTOBER TERM 1955, JANUARY SESSION, 1956.

FAY M. WHITSELL,
*Plaintiff-Appellant,*
*vs.*
ERNEST B. ALEXANDER, A. M. SKEFFINGTON, MALCOLM E. EDWARDS, JOHN J. BRADY, MARGUERITE EBERL, GLENN H. MOORE, BAUSCH & LOMB OPTICAL COMPANY and AMERICAN OPTICAL COMPANY,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 27, 1956.

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* To plaintiff's suit seeking treble damages from the defendants for an alleged violation of the Anti-trust Act, answers were filed joining issue upon the averments of fact and asserting as an affirmative dedenfese the Statute of Limitations of Illinois, which was then controlling. *Hoskins Coal & Dock Corp.* v. *Truax Traer Coal Co.*, 191 F. 2d 912 (CA-7), cert. denied 342 U. S. 947; *Schiffman Bros, Inc.* v. *Texas Company,* 196 F. 2d 695 (CA-7); *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.,* 213 F. 2d 284 (CA-7). It is admitted that the federal statute recently enacted creating a four-year limitation did not become effective until January 7, 1956, and

that, under it, "no cause of action barred under existing law on the effective date of this Act shall be revived by this Act."

On June 20, 1955, the court entered an order reciting that the matter had come for hearing on the separate issue of the defense of the statute of limitations, on the pleadings and evidence, consisting of testimony and documentary evidence; that there was no genuine issue as to any material fact bearing upon the defense of the statute of limitations and that, therefore, the action was barred and dismissed it. Plaintiff appeals, claiming that, inasmuch as he made a timely request for a jury trial, the court had no right to pass upon any of the issues of fact, and that its action in so doing constitutes prejudicial error.

The record before us does not contain any of the evidence submitted to the trial court. It includes merely the pleadings and the order dismissing the action on the ground that it was barred. Consequently, we are in no position to review the facts upon which the trial judge relied. We must assume that the unproduced evidence supported the findings of the court, and indulge the presumption that it fully justified the finding that no genuine issue of fact was involved insofar as the affirmative defense was concerned. See, *Stevenson* v. *Fisk,* 151 F. 2d 1010 (CA-5); *Kentucky Natural Gas Corp.* v. *Indiana Gas & Chemical Corp.,* 129 F. 2d 17 (CA-7), at page 21, cert. denied 317 U. S. 678; *Potter* v. *National Bank,* 102 U. S. 163, at page 166.

Consequently, we are confronted with an appeal from an order in which the court found that no genuine issue of fact was involved. Whether the court acted upon its own motion as entering a summary judgment, or whether it treated the case as one in which, had there been a jury trial, at the conclusion of the evidence, the court would have been justified only in directing a verdict for the defendants upon the plea of the statute of limitations, seems to us immaterial. In either case, the fact remains that if and when the court determined from the evidence that there was no genuine issue of fact to go to a jury, we are compelled to presume that the evidence supports the find-

ings; we have no right to intervene. For, in such case, where there is no genuine issue of fact, no factual issue is left for the jury and the decision is one of law for the court.

But plaintiff insists that his demand for a jury trial prevented the court from trying the issue of the statute of limitations under any and all circumstances. This, we think, contravenes the general rule that if there is no genuine issue of fact, there is nothing left for the jury and the court acts as a matter of law.

Thus, had a jury been impanelled to hear the evidence, including that upon the question of the applicability of the statute of limitations, and the court had found at the conclusion of the evidence that there was no genuine issue of material fact as to the affirmative defense, it would have been the court's duty to direct a verdict for the defendant. As we have said in *McIlvaine Patent Corp.* v. *Walgreen Co.*, 138 F. 2d 177 (CA-7), at 179: "The District Judge should grant a directed verdict when the evidence is such that there are no controverted issues of fact upon which reasonable men could differ." See also *MacKay* v. *Costigan*, 179 F. 2d 125 (CA-7), at 127. Neither a summary judgment nor the direction of a verdict infringes the right to a jury trial preserved by the Seventh Amendment to the Constitution where the question is one of law. *Fidelity & Deposit Co.* v. *United States*, 187 U. S. 315, at 320; *Miller* v. *Maryland Casualty Co.*, 40 F. 2d 463 (CA-2).

This is obvious where we must accept, in the absence of the evidence, the court's finding that there was no genuine issue of fact. Thus, in *Ex Parte Peterson*, 253 U. S. 300, the Court said at 310: "No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined." And, in *Alley* v. *Bessemer Gas Engine Co.*, 262 Fed. 94 (CA-5), the court commented at page 95: "In the view we take of it, the judgment of the court may be sustained by the undisputed evidence, and the absence of a jury trial was not, therefore, prejudicial to the plaintiff in error."

The finding of the court that there was no genuine issue of fact cannot, in the absence of the evidence, be disputed. Along this line, in *Floyd* v. *Ring Construction Corp.*, 165 F. 2d 125 (CA-8), cert. denied 334 U. S. 838, the court said at 129: "• • • the judgment must be affirmed provided the evidence was of such conclusive character that it would have been the duty of the court to direct a verdict for the defendant or to set aside the verdict had it been for the plaintiff." The Court of Appeals for the Eighth Circuit, in *General Tire Co.* v. *Standard Accident Ins. Co.*, 65 F. 2d 237, agreed saying at 239: "• • • However, although taking the case from the jury was erroneous, nevertheless 'the verdict will be sustained if the evidence was of such conclusive character that it would have been the duty of the court to set aside the verdict had it been for the other party'." See also *Forster* v. *Insurance Co. of North America*, 139 F. 2d 875 (CA-2). And in *Leimer* v. *Woods*, 196 F. 2d 828 (CA-8), the court said at 836-837: "• • • the wrongful denial of a jury trial is nevertheless harmless error, if 'there was no issue of fact to submit to a jury'." Though there was a reversal, it was on other grounds. As the Court of Appeals for the Second Circuit said, in *United States* v. *243.22 Acres of Land*, 139 F. 2d 678, 684, cert. denied *Lambert* v. *United States*, 317 U. S. 698: "• • • had there been a jury trial of these issues, the judge would have been required to direct a verdict. There is no constitutional right to have twelve men sit idle and functionless in a jury-box."

We think the cases cited by appellant are inapposite. None of them holds that where the reviewing court has before it none of the evidence submitted to the court, a finding that there was no issue of fact can be reviewed. It may be that, had the appellant produced the evidence, we might not agree with the trial court that no genuine issue of fact existed. But in the absence of evidence, the plaintiff was entitled to no jury trial on the question of law that arises upon the unassailable finding of the court, conclusively presumed to be supported by the evidence, that there was no genuine issue of fact.

The judgment is affirmed.

MAJOR, *C. J.* dissenting. I find myself in a rather novel position. Generally speaking, I do not agree with what Judge Lindley has written. My point is that the opinion hardly mentions, much less decides, the sole issue raised on this appeal. The contested issue as stated by plaintiff is:

> "The contested issue is whether or not in an anti-trust action seeking only damages, a timely jury demand having been made, the court can try without a jury the separate issue of limitations raised in the answers as affirmative defenses, the plaintiff having alleged various overt acts within the period of limitations."

The contested issue as stated by defendants is:

> "The facts in this case present as an issue the question of whether the trial of the separate issue of the Statute of Limitations by the Court without a jury constitutes prejudicial or reversible error, in view of the trial court's finding that there was no genuine issue as to a material fact based on the evidence adduced by the parties (none of which appellant has included in the record on appeal), and its ruling that, as a matter of law, the action was barred by the Statute of Limitations."

The latter portion of this statement, commencing with the words, "in view," obviously is a non sequitur. It is, in my judgment, this non sequiture which Judge Lindley embraces and upon which his opinion is predicated. No decision is made as to whether plaintiff was entitled to a trial by jury upon all issues of fact raised by the pleadings, including those relevant to the plea of the statute of limitations. It is not claimed that disputed issues of fact relevant to such plea were not raised by the pleadings, and it should be kept in mind that issues of fact are made by pleadings and not by testimony, whether it be oral or documentary.

If plaintiff was entitled to a jury trial as a result of his demand for such upon the factual issues made by the pleadings as they pertained to the statute of limitations, then it is immaterial what the district court heard or decided. In other words, it is immaterial whether his decision that no material issue of fact was involved, made upon the testimony which he heard, was correct or erroneous. The point is that the court had no right to hear and decide, providing, of course, that plaintiff was entitled to a jury trial. The fact that the record of the proceedings before the court is not here is of no consequence. On the issue presented, that record would be of no value.

To my mind, the question as to whether plaintiff was entitled to a jury trial on the issues under discussion poses an important and perhaps difficult problem. In view of the fact, however, that the case is to be disposed of by the majority upon another basis, no purpose could be served by an attempt on my part to decide the issue.

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***ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT***

---

## BRIEF FOR RESPONDENTS IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Appeals is printed in the appendix to the petition and is reported at 229 F. 2d 47.

### JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

## QUESTIONS PRESENTED

1. Whether the traditional procedures of summary judgment and directed verdict are the only methods by which the district court may ascertain whether there is a genuine issue as to a material fact.

2. Whether the district court's finding that no genuine issue of fact exists, based upon evidence adduced at a hearing held for the purpose of determining whether such an issue exists, can be reversed or even reviewed on appeal when the complaining party has failed to include in the record on appeal any evidence taken before the trial court.

## CONSTITUTIONAL PROVISIONS AND RULES OF COURT INVOLVED

This case is alleged to involve the right of trial by jury under the Seventh Amendment of the Constitution of the United States and Rules 38 and 39 of the Rules of Civil Procedure for the United States District Courts, implementing that constitutional provision. It is the position of respondents that neither the Seventh Amendment nor Rules 38 and 39 have any application to this case.

## STATEMENT

Plaintiff attempts to allege Sherman Act conspiracies resulting in damage to plaintiff in the pursuit of his profession as a Chicago physician and surgeon.

In substance plaintiff charges that defendants have engaged in conspiracies to restrain trade and monopolize (a) the business of publishing printed material relating to optometry and (b) the business of manufacturing and selling

optical instruments and supplies. It is alleged that pursuant to these conspiracies defendants Alexander and Skeffington caused the American Optometric Association (a professional voluntary association of optometrists), through its Council on Education and Professional Guidance, in turn to cause the Northern Illinois College of Optometry to be removed from an "accredited list" of schools of optometry maintained by the Association's Council; caused plaintiff to be separated from his position as a professor at the college; and prevented the college from referring patients to plaintiff. It is also alleged that defendant Moore and others caused a false and malicious statement to be published concerning the plaintiff.

Plaintiff filed a timely demand for a jury trial. (Rec. 50-51.)

Defendants' answers to the amended complaint deny the alleged conspiracies and, in additon, plead as an affirmative defense the Illinois two-year Statute of Limitations. (Rec. 30, 42, 50, 56.)*

On motion of defendants, after pre-trial conference, the trial court directed a separate trial of the issue of the bar of the Statute of Limitations, as permitted by Rule 42(b) of the Federal Rules of Civil Procedure. At this hearing the court did not impanel a jury but received oral and documentary evidence presented by both sides.

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*There is no dispute that the Illinois two year Statute of Limitations (Ill. Rev. Stats. Ch. 83, § 15) governs this case. *Hoskins Coal & Dock Corp.* v. *Truax Traer Coal Co.*, 191 F. 2d 912 (7th Cir. 1951), cert. denied 342 U.S. 947 (1952); *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 213 F. 2d 284 (7th Cir. 1954). The recently adopted four-year Statute of Limitations (Act of July 7, 1955, Public Law 137, § 1, 84th Cong. 1st Sess.) was not effective until January 7, 1956, and expressly provides that "no cause of action barred under existing law on the effective date of this Act shall be revived by this Act."

On the basis of the evidence thus presented the trial court entered final judgment (Rec. 58) finding that there was "no genuine issue as to a material fact" and that, as a matter of law, plaintiff's cause of action was barred by the Statute of Limitations. Accordingly, the complaint was dismissed. (Rec. 58.)

None of the proceedings had and none of the evidence adduced at the hearing upon which the trial court's findings and final judgment were based, was designated by petitioner for or contained in the record on appeal. The record is confined to the pleadings, the jury demand and the final judgment of the trial court.

The Court of Appeals affirmed the judgment of the district court.

## ARGUMENT

An accurate statement of what the district court and the Court of Appeals decided is a complete answer to the petition: The district court found that there was no genuine issue of fact relating to the defense of limitations and entered judgment on that issue as a matter of law. The Court of Appeals held that since the record on appeal did not contain the evidence presented to the district court, that court's findings as to the absence of a genuine issue of material fact must be presumed to be correct; that hence there was no issue to be passed upon by a jury; and that accordingly the trial court had correctly entered judgment as a matter of law.

It is thus apparent that no constitutional issue is involved and, moreover, that far from being such a departure from the ordinary and accepted course of judicial procedure as to call for the exercise of this Court's supervisory jurisdiction, the decision of the Court of Appeals is the only one it could correctly have reached upon the record before it.

### 1. The Trial Court's Finding That There Was No Genuine Issue As To A Material Fact Must Be Accepted As Correct.

Petitioner (plaintiff and appellant below) did not see fit to include in the record on appeal any of the evidence upon which the trial court based its finding that there was no genuine issue as to a material fact. Accordingly, under well settled principles of appellate procedure, he cannot challenge the finding of the trial court. That finding must be accepted as correct. *Potter* v. *National Bank*, 102 U.S. 163, 166 (1880); *Kinney* v. *U.S. Fidelity & Guaranty Company*, 222 U.S. 283, 284 (1911); *Stevenson* v. *Fisk*, 151 F. 2d 1010, 1011 (5th Cir. 1945); *Speh* v. *Bullard*, 90 F. 2d 227, 228 (5th

Cir. 1937); *Kentucky Natural Gas Corp.* v. *Indiana Gas & Chemical Corp.*, 129 F. 2d 17, 21 (7th Cir. 1942); *Bernards* v. *Johnson*, 103 F. 2d 567, 571 (9th Cir. 1939); *Kaschefsky* v. *Kaschefsky*, 110 F. 2d 836, 837 (6th Cir. 1940); *Rosenblum* v. *Anglim*, 135 F. 2d 512, 513 (9th Cir. 1943); *Griffiths Dairy* v. *Squire*, 138 F. 2d 758 (9th Cir. 1943); *United States* v. *Wooten*, 40 F. 2d 882, 889 (10th Cir. 1930); *Fletcher* v. *Laws*, 64 F. 2d 163, 165 (D.C. Cir. 1933).

**2. Since There Was No Genuine Issue As To A Material Fact The District Court's Refusal To Impanel A Jury To Hear The Evidence Did Not Constitute Prejudicial Or Reversible Error.**

If the district court (a) had entered the judgment complained of on a motion for summary judgment based upon affidavits or depositions or upon oral testimony as permitted by Rule 43 (e) or (b) had impaneled a jury, heard the same evidence and, upon the conclusion of the hearing, directed a verdict against him, petitioner would have no complaint.* It has long been settled that neither summary judgment nor the direction of a verdict infringes the right of jury trial preserved by the Seventh Amendment to the Constitution and Rule 38 of the Rules of Civil Procedure. *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 320 (1902); *Miller* v. *Maryland Casualty Co.*, 40 F. 2d 463, 465; 6 Moore's Federal Practice, par. 56.06 (2d ed. 1954).

Accordingly plaintiff is reduced to the contention (see Petition, p. 6, par. 5) that, although the Seventh Amendment permits the trial court, through the summary judgment procedure or on motion for a directed verdict, to ascertain whether there are any genuine issues to be tried,

*Unless he chose to contend that the evidence did not warrant the judgment, which he could only do by including the affidavits, depositions or oral testimony.

it does not permit the court to do the same thing by any other method. This contention is directly contrary to the decisions of this Court and of all the courts of appeal that have passed on the question.

The Seventh Amendment does not prescribe the method by which courts are to determine whether or what facts are actually in issue. The right to a jury trial guaranteed by that amendment has been held by this Court to be a right only to have a jury pass upon genuine issues of material fact. Thus in *Ex parte Peterson*, 253 U.S. 300 (1920), the Court held that reference of a case to an auditor to simplify the issues, *i.e.*, to eliminate all but genuine issues, prior to trial of the case before a jury, did not violate the constitutional right to a jury trial. The Court said (p. 309 *et seq.*):

> "The command of the Seventh Amendment...does not require that old forms of practice and procedure be retained. [Citing cases.] It does not prohibit the introduction of new methods for determining what facts are actually in issue...
>
> "...No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined."

The same principles were recognized in *Gasoline Products Co.* v. *Champlin Co.*, 283 U.S. 494 (1931), in which the Court said (p. 498):

> "All of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. [Citing authority.] Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure. [Citing authority.] It does not prohibit

> the introduction of new methods for ascertaining what facts are in issue, see *Ex parte Peterson*, 253 U.S. 300, 309..."

Speaking of the Seventh Amendment in *Galloway* v. *United States*, 319 U.S. 372 (1943), the Court stated (p. 392):

> "...the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions."

It is obvious from these decisions that the Seventh Amendment does not limit the trial court to stereotyped forms for determining whether there are issues to be tried.

Various courts of appeals, in reviewing trial court action identical or closely analogous to that in the case at bar, have uniformly held that since there was no contested issue of fact for the jury to determine, there was not only no denial of constitutional right but no prejudicial error. *Alley* v. *Bessemer Gas Engine Co.*, 262 Fed. 94, 95 (5th Cir. 1919); *Floyd* v. *Ring Construction Corp.*, 165 F. 2d 125, 129, 131 (8th Cir. 1948), cert. denied 334 U.S. 838; *Forster* v. *Insurance Co. of North America*, 139 F. 2d 875, 876, 877 (2d Cir. 1944); *Leimer* v. *Woods*, 196 F. 2d 828, 836, 838 (8th Cir. 1952); *United States* v. *243.22 Acres of Land*, 129 F. 2d 678, 684, cert. denied 317 U.S. 698. In each of these cases the trial court refused to impanel a jury despite the presence of a timely jury demand. In each the court of appeals held that in the absence of a genuine issue of fact it had not been prejudicial error to refuse a jury trial. In the last cited case Judge Frank, speaking for the Court of Appeals for the Second Circuit, said (129 F. 2d 684):

> "Moreover, if there was error in the denial of the

> jury trial here, it was harmless error:...had there been a jury trial...the judge would have been required to direct a verdict. There is no constitutional right to have twelve men sit idle and functionless in a jury-box."

In a number of other apposite cases, the courts have held that error in taking a case away from a jury was harmless where the evidence was such "that it would have been the duty of the court to set aside the verdict had it been for the other party." *General Tire Co.* v. *Standard Accident Ins. Co.*, 65 F. 2d 237, 239 (8th Cir. 1933); *Empire State Cattle Co.* v. *Atchison, Topeka & S.F. Ry. Co.*, 210 U.S. 1 (1907); *Burke Grain Co.* v. *St. Paul Mercury Indemnity Co.*, 94 F. 2d 458 (8th Cir. 1938).

The cases uniformly hold that the court has power to pierce the paper issues made by the pleadings and determine whether those issues actually exist and that it may do so even in the absence of a motion for directed verdict or a motion for summary judgment.† To hold otherwise would be to rule that the trial court lacks power, even in a complicated case like the one at bar, which would have required many weeks of the court's time to try on the merits, to ascertain from the evidence whether there is genuine issue as to a material fact and whether judgment should not be entered as a matter of law. As the Court of Appeals observed in its opinion, it does not matter what procedural device the trial court employed to determine whether a genuine issue of fact existed. The court had the right and

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†The error of the dissenting judge in the Court of Appeals was in assuming that a party is always entitled to a jury trial of an issue made by the pleadings, and that the court may not look beyond the pleadings to determine whether the paper issues are genuine. Thus he said: "...issues of fact are made by pleadings and not by testimony..." (Appendix to Petition, p. 5a). If this assumption were correct, there could be no summary judgments or directed verdicts.

the duty to make the determination and in doing so it did not infringe the Seventh Amendment.

### 3. The Decision Of The Court of Appeals Is Not In Conflict With Any Decision Of This Court Or Of Any Other Court Of Appeals.

Petitioner asserts (petition, pp. 5-6) that the decision of the Court of Appeals in this case is in conflict with some five decisions of this Court and four decisions of other courts of appeals. We are not favored with any explanation of how these decisions are claimed to conflict with the decision in this case. It is clear that they do not.

In *Fleitmann* v. *Welsbach Co.*, 240 U.S. 27 (1916), the Court, in holding that a Sherman Act treble damage suit cannot be maintained on behalf of a corporation through a stockholder's derivative action, referred to the defendant's right to have the treble damage action tried to a jury. This statement, of course, assumed that there were issues to be tried.

*Adamos* v. *New York Life Insurance Co.*, 293 U.S. 386 (1935), following the companion case of *Enelow* v. *New York Life Insurance Co.*, 293 U.S. 379 (1935), held that the trial court had erred in holding that certain issues were triable in equity rather than at law. Three of the four Courts of Appeals' decisions alleged to conflict with the decision in the case at bar were cases of this kind: *Ring* v. *Spina*, 166 F. 2d 546 (2d Cir. 1948), cert. denied, 335 U.S. 813; *Ettelson* v. *Metropolitan Life Insurance Co.*, 137 F. 2d 62 (3d Cir. 1943); *Leimer* v. *Woods*, 196 F. 2d 828 (8th Cir. 1952) (discussed in its other aspects above at pp. 8-9). In each of these cases the question was whether certain issues of fact admittedly presented for decision were legal or equitable and hence whether there was a right to a jury

trial. See, for a discussion of this problem, 3 Moore's Federal Practice 729-734 (2d ed. 1953).

The basis for the claim of conflict with *Indiana Farmers' Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268, 281 (1934) is even more obscure. In that case this Court reversed for a new trial a case in which the trial court had directed a verdict. The Court of Appeals had affirmed on a ground which this Court held erroneous, and this Court said that the respondent had made no effort, though it had had the opportunity and the right to do so, to show that the judgment of the Court of Appeals was right for other reasons and despite the erroneous reasoning. Accordingly, this Court remanded for a new trial.

*McCandless* v. *United States*, 298 U.S. 342, 347, 348 (1936), is even more remote from any issue presented in the case at bar. In that case this Court merely applied the rule that an erroneous ruling which relates to the substantive rights of the parties is ground for reversal unless it affirmatively appears from the whole record that the error was not prejudicial. The Court held it was clear from the record that the error was prejudicial. In the case at bar it appears from the record that there was no genuine issue of fact, and that therefore the judgment is correct.

The assertion of conflict with *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944) is inexplicable. The *Sartor* case, and *Nickelson* v. *Nestles Milk Products Corp.*, 107 F. 2d 17 (5th Cir. 1939), also alleged to be in conflict with the case at bar, merely held that there were genuine material issues of fact which prevented summary judgment, and therefore the Court reversed the summary judgments. These cases have no conceivable applicability here, where petitioner has precluded himself from challenging the finding that there was no genuine issue of fact by failing to include in the record on appeal the evidence upon which the finding was based.

## CONCLUSION

The judgment of the courts below is correct. There is no conflict between the decision of the Court of Appeals in this case and any decision of this Court or any other court. Not only does the petition fail to present any question appropriate for review by this Court, but it fails to present any question of substance.

Respectfully submitted,

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